IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 2431 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE A.M.KAPADIA
HONOURABLE MR.JUSTICE K.A.PUJ

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?
2	To be referred to the Reporter or not ?
3	Whether their Lordships wish to see the fair copy of the judgment ?
4	Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?
5	Whether it is to be circulated to the civil judge ?

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JETHUSINGH MANGALSINGH BHATI - Appellant(s)
Versus
STATE OF GUJARAT & 1 - Opponent(s)

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Appearance :
MR RAMNANDAN SINGH for Appellant(s) : 1,
MR KT DAVE, Additional Public Prosecutor for Opponent(s) : 1,

MRS VASAVDATTA BHATT for Opponent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE A.M.KAPADIA

and

HONOURABLE MR.JUSTICE K.A.PUJ

Date : 18/01/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE K. A. PUJ)

1. The appellant – original accused has filed this appeal under Section-374 of the Criminal Procedure Code against the judgment and order of the learned Special Judge (NDPS) Fast Track Court at Mehsana dated 9.1.2003 rendered in Special (NDPS) Case No.1 of 1999 for the offence punishable under Section-8(c) and Section-21 read with Section-29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act') and sentencing him to undergo R.I for 10 years and to pay fine of Rs.1 lac, in default thereof, to undergo S.I of 1 year.

2. The case of the prosecution as revealed in the complaint and as unfolded during the course of trial is briefly stated as under :-

3. The complaint came to be lodged before the Intelligence Officer, Narcotic Control Bureau, Zonal Unit, Ahmedabad for the offences punishable under Section-8(c) and Section-21 read with Section-29 of the Act. A specific information was received by NCB,Ahmedabad that one person Jethusingh would reach Mehsana Bus Stand on 13.10.1998 around 4:00 p.m and would be carrying 3 kgs of heroine in cloth bag. An unknown person also will reach the bus stand at the same time. It is alleged that the said information was reduced into writing and with the help of ATS, Ahmedabad, raid was carried out at Mehsana Bus Stand on 13.10.1998. It is alleged that on 15.45 hours one person was intercepted whose name was disclosed as Jethusingh Bhati. He was informed that

search has to be carried and was asked whether he wanted to be searched in presence of any Gazetted Officer and therefore the Zonal Officer being a Gazetted Officer was present and in his presence the search was made in compliance of Section-50 of NDPS Act. It is further alleged that during the course of search, 3 packets were found from the cloth bag, which bore the round seal of A1 Grade and 99 mark. One of packets was alleged to have been opened and some powder was found and the same was tested by Narcotic Drugs Testing Kit, which gave positive result of heroine. It is alleged that statement of the accused was recorded under Section-67 of the Act wherein it is alleged that the accused inter alia confessed crime. One Mr.Patel was going to purchase the said substance. However, Mr.Patel did not come to Bus Stand and the accused was told to wait at the Bus Stand. As such the substance was found and arrest panchnama was prepared. It

was alleged that the cost of the said substance was Rs.50,000/- per kg and it was to be sold at Rs.90,000/- per kg.

4. It was also the case of the prosecution that no such person was ever traced and therefore Jethusingh was the only accused in the present case. The sample of seized articles were drawn and the same was sent to FSL for chemical analysis and the report is alleged to have been positive and ultimately charge sheet came to be filed against the present appellant and the charge was framed by registering the Special Case No.1 of 1999 before the Special Judge (NDPS), Mehsana, Fast Track Court.

5. Pursuant to the filing of the complaint, investigation was put into motion. During the course of investigation, statement of witnesses were recorded, panchnama of scene of offence was prepared, muddamal articles

were recovered by drawing panchnama, which were sent to Forensic Science Laboratory ('FSL' for short) for chemical analysis. After obtaining FSL Reports, since sufficient incriminating evidence was found against that accused, he was charge-sheeted in the Court of learned Special Judge (NDPS), Fast Track Court at Mehsana. The learned Special Judge (NDPS), Fast Track Court at Mehsana framed charge against the accused for the offences punishable under Section-8(c) and Section-21 read with Section 29 of the NDPS Act.

6. The charge was read over and explained to the accused. As the accused person has pleaded not guilty to the said charge and claimed to be tried, he was put to trial by the learned Special Judge (NDPS), Fast Track Court, Mehsana in Special (NDPS) Case No.1 of 1999.

7. To prove the culpability of the accused

the prosecution has examined as many as 5 witnesses, details of which are as under:-

Sr.No.	Particulars	Exh.No.	Page No.
1	P.W No.1 – Kantilal Bhudarlal Thakkar.	22	94-100
2	P.W No.2 – Upendrakumar Haridas Patel.	51	132-142
3	P.W No.3 – Rakeshkumar Kantilal Datniya.	64	161
4	P.W No.4 – Pavansinh Shrigunjsinh Tomar.	66	163-171
5	P.W No.5 – Jitendra Nirjanlal Raghuvanshi.	78	189-192

8. Prosecution has also produced as many as 9 documents and relied upon the contents of the same, details of which are as under:-

Sr. No.	***Particulars***	***Exh. No.***	***Page No.***
01.	Charge-sheet.	1	39-44
02.	Panchnama.	9	52-53
03.	Arrest panchnama of the appellant – accused.	23	101-102

Sr. No.	***Particulars***	***Exh. No.***	***Page No.***
04.	Report of Zonal Director, Narcotic Drugs Control, Bharuch.	55	146
05.	Receipt issued by FSL.	65	162
06.	Godown receipt issued by the Zonal Director, Narcotic Drugs Control, Ahmedabad.	67	172
07.	Report given by Zonal Director, Narcotic Drugs Control, Ahmedabad.	68	173
08.	Forwarding letter issued by Zonal Director, Narcotic Drugs Control Bureau, Ahmedabad to Dy. Director FSL Ahmedabad	69	174-175
09.	FSL Report.	72	178-182

9. After recording of the evidence of the prosecution witnesses was over, the learned Special Judge (NDPS), Fast Track Court at Mehsana explained the accused the

circumstances appearing against him in the evidence of the prosecution witnesses and recorded his further statement, as required under Section 313 of the Code. In his further statement, the accused denied the case of the prosecution by reiterating that he has been falsely implicated. The appellant in his further statement has stated that he was not arrested from the Bus Stand. Nothing was recovered from his possession. He was working as driver with Haribhai Manubhai Patel of Palanpur and he brought him to Mehsana on 13th evening. Thereafter, NCB Officials have prepared false papers and after giving threats to him they have recorded his answers in a manner that suit to their investigation and his signatures were obtained. They have got adequate evidence against Mr.Patel and yet false case was registered against him.

10. On appreciation, evaluation, analysis and

close scrutiny of the evidence adduced by the prosecution, the learned Special Judge (NDPS), Fast Track Court at Mehsana has held that the prosecution has established beyond reasonable doubt that the charge levelled against the accused was proved and, therefore, the accused was held guilty of the offence punishable under Sections-8(c) and Section-21 read with Section 29 of the Act. Thereafter, the learned Special Judge (NDPS), Fast Track Court at Mehsana heard the accused and his advocate on sentence and looking to the gravity of the offence committed by the accused and looking to the circumstances, the appellant - original accused was sentenced to suffer rigorous imprisonment of 10 years and fine of Rs. 1 Lac and in default thereof, S.I of 1 year for the offence punishable under Section-8(c) and Section-21 read with Section 29 of the Act.

11. Mr. Ramnandan Singh, learned advocate appearing for the appellant – accused has submitted that the learned Special Judge (NDPS), Fast Track Court at Mehsana has committed an error apparent on the face of the record by convicting the appellant – accused for the offence under Section-8(c) and Section-21 read with Section 29 of the Act. The learned Special Judge has misdirected himself in appreciating the evidence placed on record. The learned Special Judge recorded the findings which are not based on the evidences placed on record. The learned Special Judge should have appreciated the evidence and should have also held that the prosecution has failed to prove the offences against the appellant – original accused beyond reasonable doubt and, therefore, the learned Special Judge ought to have acquitted the appellant. He has further submitted that the raid was conducted on 13.10.1998 whereas the muddamal i.e. Sample

was sent to Laboratory on 15.10.1998. This delay is not explained, because there was no reason to keep the muddamal / sample with NCB for a period of 2 days when the Forensic Science Laboratory is situated at Ahmedabad. This creates a serious doubt regarding tampering of the muddamal. He has further submitted that the chemical analyzer has not been examined and, therefore, in absence of the examination of the chemical analyzer, the learned Special Judge has committed serious error in believing that the muddamal was narcotic substance. He has, therefore, submitted that the appellant – accused deserves to be acquitted alone on this ground. He has further submitted that in the FSL report percentage of morphine found is not shown in the report and hence the benefit of doubt should have been given to the appellant – accused. He has further submitted that the report does not show that there was tomatography test. Therefore, it is

very difficult to come to a conclusion with certainty, because even in other kinds of vegetables similar result may come. However, the tomatography test makes it confirmative that the substance was narcotic substance. Since this lacuna goes to the root of the matter, the appellant – accused deserves for the benefit of doubt. He has further submitted that as far as poppy capsule is concerned, in the ultimate analysis, it is science of vegetables, in which there are different family plants. As per Section-2(xvii), “opium poppy” means (a) the plant of the species “Papaver Somniferum L”, and according to evidence of botanical expert in the bye products of Papaver plant, similar symptoms are found in tobacco green and yellow colour having similar qualities and the only test to be made for arriving at a conclusion is tomatography test by which it can positively be ascertained whether the substance contained opium or not.

12. Mr.Singh further submitted that mal-khana register was not produced to show that in whose custody the sample / muddamal was kept for two days. Because, whenever the muddamal is kept in Police Station, the mal-khana authority has to make an endorsement to that effect and not only that but the register is also required to be produced, but the concerned authority who is incharge of mal-khana is required to be examined so as to see how the muddamal was same which was deposited with the malkhana and it was not tampered with during the period of two days. However, one godown receipt vide Entry No.6 is produced below Ex.67 showing that the samples were sealed with the seal of No.2 – Shri U.H.Patel, Inspector, Intelligence Officer. However, the said godown officer was not examined and in that receipt also no time is mentioned and similarly the date is shown as 14.10.1998. This creates a serious doubt

when muddamal was brought to the godown, which is required to be considered for giving the benefit of doubt to the appellant – accused.

13. In support of this submission Mr.Singh has relied on the judgment of the Hon'ble Supreme Court **in the case of State of Rajasthan Vs. Gurmail Singh, reported in 2005 CRI.L.J. 1746**, wherein while confirming the order of acquittal passed by the Rajasthan High Court, it is observed that in the fist instance, though the seized articles are said to have been kept in the Malkhana on 20th May, 1995, the Malkhana register was not produced to prove that it was so kept in the malkhana till it was taken over by PW-6 on June 5, 1995. The Court further found that no sample of the seal was sent along with the sample to Excise Laboratory, Jodhpur for the purpose of comparing with the seal appearing on the sample bottles. The Court therefore held

that there is no evidence to prove satisfactorily that the seals found were in fact the same seals as were put on the sample bottles immediately after seizure of the contraband. The Court further held that these loopholes in the prosecution case have led the High Court to acquit the respondent.

14. Mr.Singh has further relied on the decision **in the case of Savitri alias Shoobha Vs. State of Chattisgarh, reported in 2001 CRI.L.J. 4602**, wherein it is held that in absence of examination of Malkhana Mohirir and because of non-production of the register of Malkhana showing the deposit entries of the alleged contrabands and samples, it would not be possible for a Court to hold that the articles were deposited with the Malkhana. The best evidence relating to the deposit, though available with the prosecution, was not produced in the Court. The Court further held that even otherwise, from the evidence

it would appear that the police did not comply with the provisions of Section-55 of the NDPS Act. The Court therefore held that the prosecution has failed to prove its case beyond doubt against the accused. Accordingly, the Court has acquitted the accused and the jail authorities were directed to release the accused forthwith, if not required in any other matter.

15. Mr.Singh has further relied on the decision **in the case of Ladoo Ram Vs. Union of India, reported in 2002 CRI.L.J. 749**, wherein after observing that person Incharge, Malkhana, with whom impugned samples remained immediately after seizure till they were sent to Nimach factory for examination, has not been examined nor Malkhana register or its copy has been produced in support of the testimony as to what happened with regard to samples after the seizure until they were sent to Nimach factory for examination. The

Court further held that all these inconsistencies, contradictions and embellishments affect the testimonial value of the remaining witnesses, who are employees of the Bureau and no implicit reliance can be placed upon them. The Court below has not assessed and analysed the ocular and documentary evidence in right perspective and has not reached to a correct conclusion and consequently, the Court accepted the appeal, and conviction and sentence awarded to the accused was quashed and set aside.

16. Mr.Singh further submitted that the arrest panchnama was prepared at 10:30 p.m whereas the raid was conducted at 4:15 p.m. Therefore, the arrest panchnama prepared at very late hours shows that the entire documents were prepared in the Police Station and not at the place where the raid was conducted. He has further submitted that when the second accused named by the present

appellant was never found to be existent, the entire case appears to be fabricated and, therefore, also the appellant deserves to be acquitted. He has further submitted that the written arguments produced by the accused were never considered by the learned Additional Sessions Judge. From the evidence produced by the prosecution it is not clearly established that the raid was conducted at the Bus Stand itself. Even the information that was alleged to have been received was not believable and this aspect has not been properly appreciated by the learned Special Judge. He has further submitted that traveling from Ahmedabad to Mehsana is certainly based on contradictions, because both the logbooks have been tampered with. It has been tampered only for journey from Mehsana to Ahmedabad, which has not been explained at all. Even kilometers are different when both the vehicles were going together. How this difference could arise,

is a matter of serious concern. The timing to leave Ahmedabad is also different.

17. Mr.Singh further submitted that out of two panchas, only one has been selected and one was dropped and even when panchnama was actually started and ended is also not free from contradiction. There is some amendment in the panchnama, which creates a serious doubt upon the genuineness of the panchnama. It was alleged that one Shri Trivedi dictated that panchnama. However, he was never examined. He has further submitted that there are lots of contradictions in the version of the witnesses with regard to travelling from Ahmedabad to Mehsana, panchnama and time taken for this raid etc. The appellant – accused therefore ought to have been given benefit of doubt.

18. Mr.Singh further submitted that out of 8 witnesses, 4 witnesses were dropped and this

creates doubt on the genuineness of the case of the prosecution and hence the appellant deserves acquittal. He has further submitted that though the search was said to have been made in presence of Gazetted Officer, as such no written document was signed by the accused to show that it was really done at the time of raid. He has, therefore, submitted that proper compliance under Section-52 of the Act has not been made. Mr.Singh has, therefore, submitted that appeal of the appellant – accused deserves to be allowed and the appellant – accused be released forthwith.

19. Mr. K. T. Dave, learned Additional Public Prosecutor appearing for State of Gujarat, on the other hand, supported the order and judgment of the learned Special Judge, (NDPS), Fast Track Court at Mehsana and submitted that there was no violation of any statutory provision and all necessary compliances were made by the raiding parties

and/or investigating agency and there was no substance in the argument that the provisions contained in Section-50 and 52 of the Act were violated. He has further submitted that there is no substance in the various grounds raised by the appellant – accused before this Court. The charge levelled against the appellant – accused was proved beyond reasonable doubt and the learned Special Judge, (NDPS), Fast Track Court at Mehsana has rightly convicted the appellant and no interference is called for while deciding this appeal.

20. We have considered the submissions advanced by Mr. Ramnadan Singh, learned advocate appearing for the appellant – original accused and Mr. K.T. Dave, learned Additional Public Prosecutor appearing for State of Gujarat at length. We have also undertaken a complete and comprehensive exercise of appreciating all vital features

of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case. We have also gone through the entire testimonial collections. We have applied our mind to the impugned judgment and order passed by the learned Special Judge, (NDPS) Fast Track Court at Mehsana convicting the appellant – accused.

21. Though several contentions were raised before the trial Court and before this Court, we confine ourselves to deal with the strong protest lodged on behalf of the appellant – accused against non-production of godown register, non-examination of material witnesses and apparent contradictions found in the evidence of witnesses with regard to sealing of samples and remaining contraband articles.

22. Panch witness P.W No.1 - Kantilal Bhudarlal Thakkar Ex.22 has deposited in his

deposition that Shri Tomar has taken two samples of 5 gram each from each bag and put them in the plastic bag and stapled them and they were put into khakhi colour envelop and thereupon office seal was affixed. Both the panchas as well as the officer have signed the said envelop. In his cross-examination, he has recorded that all these samples of 5 gram each were put into one paper bag. Panchnama Ex.23 indicates that two samples of 5 gram each were taken from different packets and they were put in small plastic bag duly stapled with and were put into khakhi colour envelop and seal of Narcotic Control Bureau was applied and it was signed by two panchas as well as the officer. As against this P.W. No.2 - Shri U.H.Patel Ex.51 in his deposition has stated that two samples of 5 gram each were kept in separate plastic bag and these bags were put into paper bag and each paper bag was packed with adhesive tap and thereon seal of NCB – AZU-2 (Ahmedabad

Zonal Unit-2) was affixed and on those envelops two panchas as well as he himself have signed. P.W. No.4 – Shri P.G.Tomar Ex.66 has deposed in his deposition that samples of 5 gram each were taken from each packet and they were put into small plastic bag and that small plastic bag was put into a paper envelop and on each of these specimen adhesive tap was affixed and thereupon office seal of NCB AZU-2 was affixed and on each of these packets, 2 panchas as well as Seizing Officer Mr.Patel have signed. Godown receipt produced at Ex.67 on page-172 of the paper book refers that 3 packets plus 3 samples (duplicate marked A2, B2, C2) were received and they were entered into godown register vide Entry No.6. Neither this godown register nor Entry No.6 were produced before the Court. This receipt was issued by Zonal Director – Mr.P.S.Tomar and endorsement was also made to the effect that he was Officer Incharge of godown. It appears from this

receipt that these 3 packets as well as 3 samples were received on 14.10.1998. However, at what time the same were received was not mentioned. From the deposition of P.W. No.3 – Rakeshkumar Kantilal Datniya Ex.64 it appears that P.W. No.4 – Shri P.S.Tomar has handed over to him a seal cover and 3 samples on 15.10.1998 to be delivered to FSL. From this deposition as well as from the receipt issued by the Narcotic Control Bureau having received the sample on 15.10.1998 it appears that for 2 days the samples must have been retained by NCB. Admittedly, it has not been received in godown as the godown receipt does not indicate to have received these samples. It is also pertinent to note that panchnama was written by Mr.Trivedi. He has also recorded the statement of the appellant in the jail and yet he has not been examined despite being cited as prosecution witness. It is equally important to note that the

appellant's statement under Section-67 was recorded on 14.10.1998. He has referred to the name of Mr.Patel and Mr.Latifkhan. The contraband articles were given by Latifkhan and the same were to be delivered to Mr.Patel of Palanpur. The detailed address of Latifkhan, son of Sattarkhan Mehar, Village – Sam, Tehsil – Jesalmer, District – Jesalmer, was given and yet no inquiry was made by the investigating agency.

23. From the aforesaid discrepancies in the depositions of the prosecution witnesses and different version about sealing procedure as well as the movement of samples and other contraband articles and on consideration of the totality of the facts and circumstances of this case, more particularly the facts disclosed by the appellant – accused in his further statement, we are of the view that there is serious question mark on the credibility and trustworthiness of the entire

prosecution version. There is lurking doubt whether the samples which have been sent to the FSL were infact those which were recovered from the appellant ? The possibility of tempering with the samples in the facts and circumstances of the case cannot be ruled out. Consequently, the benefit of doubt has to be given to the accused according to the basic principles of the criminal jurisprudence.

24. In this view of the matter, it is very unsafe to sustain the conviction order. The appellant accused is in jail right from the date of incident and more than 8 years have passed. Despite these descripencies, contradictions, infirmities and inconsistencies in the prosecution version and despite the fact that the case against him has not been proved beyond reasonable doubt, the appellant – accused has to remain in jail for more than 8 years and it is very

unfortunate that the appeal could not be heard earlier.

25. In peculiar facts of the case and in light of the decisions referred to herein above and the principles laid down therein, this Court is of the view that the conviction order passed against the accused cannot be sustained. The Appeal, therefore, succeeds. The judgment and order of the learned Additional Sessions Judge, Mehsana dated 9.1.2003 passed in Special (NDPS) Case No.1 of 1999 convicting the appellant to undergo RI for a period of 10 years and also to pay a fine of Rs.1 lac and in default thereof to undergo RI 1 year more is hereby quashed and set aside. The appellant – accused i.e. Jethusingh is hereby acquitted from the charges levelled against him. The respondent – State of Gujarat and jail authority is hereby directed to release the appellant – original accused from the jail forthwith, if

his presence is not required in connection with any other case. The amount of fine, if paid, shall be refunded to him.

26. This appeal is accordingly allowed.

(A. M. KAPADIA, J.) (K. A. PUJ, J.)

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